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CONSTELLATION BRANDS, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN EDSTROM, BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK M. NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE,

Plaintiffs,

vs.

ANHEUSER-BUSCH InBEV SA/NV, GRUPO MODELO S.A.B. de D.V., and CONSTELLATION BRANDS, INC.,

Defendants.

Case No. C-13-1309 MMC

Assigned to Hon. Maxine M. Chesney

BRIEF OF CONSTELLATION BRANDS, INC., IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

DATE: **TBD**
TIME: **TBD**
JUDGE: **Hon. Maxine M. Chesney**

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STATEMENT OF THE ISSUES TO BE DECIDED

1. Where the transaction being challenged (ABI's acquisition of Modelo's shares through a tender offer) already has occurred and where Plaintiffs' complaint lacks merit under any antitrust theory and the motion for preliminary relief fails to meet any of this Court's requirements for a TRO, should Plaintiffs' TRO motion be summarily denied as moot and the complaint dismissed?

Anheuser-Busch InBev NV/SA ("ABI") closed on its acquisition of shares of Grupo Modelo S.A.B. de C.V. ("Modelo") through the completion of a tender offer in Mexico earlier today. Plaintiffs' counsel was aware that the scheduled closing could occur today, as their motion noted that "Defendants threaten to immediately close this acquisition on June 4, 2013." Pls.' Mot. TRO 2:18-19, June 3, 2013, ECF No. 42. Plaintiffs chose to wait until the eleventh hour to file their Motion for a Temporary Restraining Order ("TRO") even though the transactions, including Constellation Brands, Inc.'s ("Constellation") acquisition of the Modelo U.S. business, were first announced approximately a year ago and were the subject of a lengthy investigation by the Antitrust Division of the U.S. Department of Justice ("DOJ"). DOJ concluded that the transactions would likely *improve* competition over the current industry structure. That investigation resulted in a consent order in mid April that enabled ABI's acquisition of Modelo shares and Constellation's acquisition of the Modelo U.S. business to proceed. For the reasons set forth below, Constellation's acquisition of the Modelo U.S. business is procompetitive, and Plaintiffs' complaint raises no valid antitrust claims. Given that the transaction that is the subject of Plaintiffs' motion (ABI's acquisition of Modelo shares) has been completed, and Constellation's acquisition of the Modelo U.S. business from ABI, scheduled to close on Friday, is procompetitive, Constellation urges that no judicial action is necessary other than a denial of Plaintiffs' motion and a dismissal of Plaintiffs' First Amended Complaint ("FAC") following the Court's review of the Defendants' motions to dismiss, filed yesterday, June 3. Any action that could delay the transactions would cause serious harm to Constellation and to beer consumers.

Plaintiffs contend that ABI's acquisition of Modelo violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and that ABI and Constellation will violate Section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing to fix prices after ABI purchases Modelo. (FAC ¶ 118.) Defendants moved to dismiss those claims. Plaintiffs cannot satisfy *any* of the elements required for a TRO. They have made no showing (much less a clear showing by substantial proof) that they are likely to succeed on the merits because they have not offered any evidence in support of their claims, and therefore there is no basis to justify Plaintiffs' discovery requests. Plaintiffs make baseless attacks on Constellation's suitability to operate the Modelo U.S. business effectively. *See* Pls.'

Mot. TRO 6:18-28. These attacks are refuted by DOJ's Competitive Impact Statement ("CIS"), filed in the U.S. District Court for the District of Columbia, and the Declaration of Paul Hetterich, Constellation's Executive Vice President for Business Development and Corporate Strategy. Indeed, the CIS shows conclusively that the revised ABI/Modelo transaction violates no antitrust laws and Mr. Hetterich testifies that there is *no* agreement between Constellation and ABI to fix prices.

Plaintiffs cannot make any showing that the balance of equities tips sharply in their favor. Contrary to Plaintiffs' assertion (Pls.' Mot. TRO 9:12-16), any delay in consummating the transactions will seriously prejudice Constellation and its shareholders, and such prejudice substantially outweighs any prejudice Plaintiffs would experience from the transactions going through. In any event, Plaintiffs contributed to the harms they assert they will experience. They waited until March 22 to file this lawsuit, and did not file their motion until the day before the ABI/Modelo transaction closed.

Finally, the DOJ has vindicated the public interest by endorsing the transaction by which Constellation is buying Modelo's U.S. business. The TRO that Plaintiffs seek, on the other hand, would serve only their own interests, and threatens to delay a deal that preserves and even enhances competition in the U.S. beer industry. Restraining the transaction delays Constellation's taking control of the assets that it will use to increase competition in the U.S. beer marketplace.

FACTUAL BACKGROUND

In its opposition to Plaintiffs' motion for a TRO, ABI provides extensive factual background on the original and revised transactions. Accordingly, Constellation will not belabor such details. Instead, Constellation incorporates by reference ABI's statement of facts and arguments and stresses certain key facts related to Constellation's role in the revised transactions.

The DOJ filed suit on January 31, 2013, to stop the original ABI/Modelo transaction, which would have seen ABI acquire Modelo, but sell Modelo's fifty-percent stake in Crown to Constellation with a license for U.S. distribution of Modelo's beers that would be terminable after ten years. The DOJ alleged that Constellation would have been dependent on ABI to supply its beer, facilitating joint pricing and curtailing Constellation's ability and incentive to compete

aggressively. Complaint ¶¶ 8–11, 71, 78, *United States v. Anheuser-Busch InBev SA/NV*, No. 13-127 (D.D.C. Apr. 19, 2013), ECF No. 1 (Ex. 1) (hereinafter "DOJ Compl."). In light of these objections, the parties then revised the transactions to satisfy the expressed concerns of the DOJ. More specifically, ABI agreed to sell Constellation "Modelo's newest, largest, and most efficient brewery, located in Piedras Negras, Mexico, and a perpetual, exclusive, paid-up license to produce, market, and sell in the United States certain Modelo brands, for an additional $2.9 billion." (Ex. 2, Hetterich Decl. ¶ 7.)

The DOJ reviewed the restructured transactions carefully, determined that they are procompetitive, and ultimately allowed them to proceed pursuant to a consent order. The purpose of the consent order is to "establish[] a viable competitor in the brewing and sale of Beer . . . that would fully resolve the United States' claims in this antitrust lawsuit . . . ." (Stipulation and Order at 6–7, *United States v. Anheuser-Busch InBev SA/NV*, No. 13-127 (D.D.C. Apr. 19, 2013), ECF No. 29-1 (Ex. 4) (hereinafter "consent order").) The DOJ further required that Constellation commit to double the capacity of this state-of-the-art brewery by the end of 2016, making Constellation "fully self-sufficient" and "able to produce all the beer needed to meet U.S. demand for the Modelo brands." (*Id.*) In the interim, the DOJ consented to allow ABI to supply consulting services, input products, and beer to Constellation as needed at contractually set prices, and subject to firewalls that protect Constellation's competitively sensitive information. These transactions will *decrease* concentration in the U.S. beer industry.

This Court need not rely, however, on the words of Constellation, ABI, or Modelo. The DOJ endorsed these transactions, and did so *because* they make Constellation "an independent and economically viable competitor that will stand in the shoes of Modelo." Competitive Impact Statement at 10, *United States v. Anheuser-Busch InBev SA/NV*, No. 13-127 (D.D.C. Apr. 19, 2013), ECF No. 30 (Ex. 3) (hereinafter CIS).[1] Furthermore, as the DOJ approvingly recognizes,

[1] The DOJ's Competitive Impact Statement, filed in the U.S. District Court for the District of Columbia and available on the DOJ website at http://www.justice.gov/atr/cases/f296000/296027.pdf, is an official government document of public record. It is thus "generally known" within this Court's jurisdiction and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Constellation therefore respectfully asks this Court to take judicial notice of the CIS. *See Paralyzed Veterans of Am. v. McPherson*, Case No. C 06-4670 SBA, 2008 U.S. Dist. LEXIS 69542, at *17-18 (N.D. Cal. Sept. 9, 2008) ("It is not uncommon for courts to take judicial notice of factual

these transactions will "eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." (*Id.* at 2)

The DOJ consent order allows the parties to proceed with their transactions. As it stands, ABI has already acquired a majority of the voting shares of Modelo and gained control of the company. (Ex. 2, Hetterich Decl. ¶ 8.) On April 25, 2013, shortly after the DOJ completed its investigation, ABI completed its acquisition of two Modelo subsidiaries, which gave it a majority of the voting shares of Modelo. (*Id*.) On May 1, ABI launched a tender offer in Mexico to acquire the outstanding shares of Modelo that it does not already own. (Ex. 2, Hetterich Decl. ¶ 8). That tender offer expired on May 31. (Ex. 2, Hetterich Decl. ¶ 8.) This morning, June 4, ABI completed its acquisition of the Modelo shares that had been tendered. (*Id.*)

In the meantime, on June 3, 2013, Defendants Constellation, ABI and Grupo Modelo, moved the Court to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) based on Plaintiffs' inability to state a claim on which relief could be granted.

ARGUMENT

For Plaintiffs to obtain the "extraordinary and drastic remedy" of preliminary injunctive relief, "the requirement for substantial proof is much higher" than would otherwise be necessary to establish liability. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Plaintiffs must make a "clear showing" that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Ninth Circuit follows a "sliding scale" approach, which emphasizes whether the Plaintiffs raise "serious questions" going to the merits, so as to demonstrate a likelihood of success, and whether the balance of hardships "tips sharply" in Plaintiffs' favor. *See, e.g.*, *AT&T Mobility LLC v. Bernardi*, Nos. C 11-03992 CRB & C 11-04412 CRB, 2011 U.S. Dist. LEXIS 124084, at *10 (N.D. Cal. Oct. 26, 2011) (citation omitted). Although a very strong showing on those two

information found on the world wide web. This is particularly true of information on government agency websites, which have often been treated as proper subjects for judicial notice.") (citation and internal quotation marks omitted).

factors can offset a comparatively weaker showing on the remaining two, failure to establish any of the elements is fatal to a motion for preliminary relief such as a TRO. *See id.*

I. PLAINTIFFS RAISE NO SERIOUS QUESTIONS GOING TO THE MERITS AND THUS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS.

Plaintiffs' allegations are fundamentally deficient, and fail to state a claim. All defendants have moved to dismiss Plaintiffs' claims against them. Constellation Mot. Dismiss, June 3, 2013, ECF No. 40; ABI/Modelo Mot. Dismiss, June 3, 2013, ECF No. 41. The lack of ability to even plead viable claims defeats a likelihood of success on the merits. Moreover, moving beyond the FAC allegations, the actual facts show in greater detail the futility of Plaintiff's attempted TRO. As the DOJ recognized in its analysis approving the revised transaction, Constellation will be an "independent," "robust," and "aggressive[]" competitor in the U.S. beer industry by "stand[ing] in the shoes of Modelo." (Ex. 3, CIS at 8-10.). Plaintiffs attempt to impugn Constellation with baseless allegations of price-fixing and claims that Constellation will be little more than a "puppet" of ABI. (FAC ¶ 20.) These attacks fail to raise serious questions going to the merits because Plaintiffs do not and cannot offer any evidence that plausibly refutes the DOJ's analysis of the transactions or the sworn testimony of Constellation's Executive Vice President, Mr. Hetterich, who participated in negotiating both the original and revised transactions and possesses extensive knowledge of the deal. (Ex. 2, Hetterich Decl. ¶ 1.) The CIS and the Hetterich Declaration establish that the transactions will enhance competition in the U.S. beer industry by making Constellation a capable and aggressive competitor. On the other hand, Plaintiffs offer no facts in support of their TRO. Their attempted offer of facts—through a declaration from one of their attorneys purporting to opine on the beer industry about which he presents no personal knowledge—is simply inadmissible, leaving Plaintiffs with nothing to support their motion.

A. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Section 1 Claim.

Plaintiffs' FAC includes a claim under Section 1 of the Sherman Act, but their motion for a TRO is not based on that claim. Section 1 of the Sherman Act prohibits a "contract,

combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1 (2006). In short, in a price-fixing case, there must be an *agreement* to raise or fix prices.

As more fully explained in Constellation's motion to dismiss this case, Plaintiffs do not adequately plead a Section 1 claim. The FAC repeatedly hems and haws, speculating that the transactions "*may*, and *probably* will" (FAC ¶ 10 (emphasis added)) or "*threaten*" (*id.* ¶ 22 (emphasis added)) to result in price-fixing, or that a Section 1 violation is "*probable*" (*id.* ¶ 26 (emphasis added)). The best Plaintiffs can allege is that Constellation has conspired with ABI to follow its price leads in the future. (FAC ¶ 97.) That wholly conclusory allegation, made without any supporting factual allegations, fails to state a claim under *Twombly*. In any event, Plaintiffs' non-committal theorizing cannot overcome the unequivocal Declaration of Mr. Hetterich that there is no such agreement and no plan to enter into any such agreement: "At no time during the negotiations of either set of agreements did Constellation tacitly or explicitly agree with ABI to raise or fix prices. Constellation has not promised to enter into a future agreement with ABI to raise or fix prices. Constellation has no intention to enter into an agreement or promise to agree with ABI to raise or fix prices." (Ex. 2, Hetterich Decl. ¶ 22.) In light of this evidence—which they cannot contradict—Plaintiffs cannot state a Section 1 claim, much less show entitlement to a TRO.

As detailed in Constellation's and ABI/Modelo's motions to dismiss, Plaintiffs' FAC fails to allege a violation of Section 1 of the Sherman Act claim against Constellation and ABI. Plaintiffs' attempt to introduce new "factual" information in their motion for a TRO to prop up their Section 1 claim cannot remedy the FAC's deficiency. Moreover, the "Hart-Scott-Rodino documents," prematurely and ambiguously requested by Plaintiffs, were submitted to DOJ for use in its analysis of the potential competitive effects of the ABI/Modelo transaction and would not inform a Section 1 price-fixing analysis. Any request by Plaintiffs for discovery related to that new category of analysis would impose significant additional costs and burden on Constellation. Plaintiffs' discovery request, therefore, should be denied.

B. Plaintiffs Have Not Demonstrated a Likelihood of Success on Their Section 7 Claim.

Section 7 of the Clayton Act "prohibits a person 'engaged in commerce or in any activity affecting commerce' from acquiring 'the whole or any part' of a business' stock or assets if the effect of the acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004) (quoting 15 U.S.C. § 18). To establish a prima facie Section 7 violation, Plaintiffs must show that "the merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market." *Id.* at 1110 (citations and internal alterations omitted).

Plaintiffs' case is destined for failure because it is premised on the faulty conclusion that ABI—not Constellation—will control the U.S. Modelo business. Plaintiffs cannot meet their burden—and indeed are *unlikely* to succeed on the merits—as they have no evidence to support their allegation that ABI will acquire Modelo's U.S. business because Constellation's purchase of those assets is "fraudulent." In contrast, the DOJ's competitive impact analysis and Mr. Hetterich's Declaration demonstrate—contrary to Plaintiffs' baseless claims about financing, expertise, and control—that Constellation is well-positioned to purchase Modelo's U.S. business and operate that business as a major competitor in the U.S. beer industry. After consummation of the transactions, Constellation effectively will own Modelo's brands in the United States, operate its own brewery, and completely control its supply chain. As the DOJ made clear, the transaction with Constellation "preserves the current structure of the beer market in the United States" because Constellation will be "an independent and economically viable competitor that will stand in the shoes of Modelo." (Ex. 3, CIS at 10). Further, the transactions are procompetitive because they "will eliminate the existing entanglements between ABI and Modelo vis-à-vis the beer market in the United States." *Id.* at 2.

Plaintiffs' arguments that ABI's acquisition of Modelo shares will violate Section 7 are without merit, and the cases they cite are simply inapplicable here. Just because a Supreme Court case deals with an acquisition in the beer industry does not mean that case establishes law

relevant to this matter. Far from being "on all fours," *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), is readily distinguishable. There, Pabst Brewing Company was acquiring another competitor and it was clear that there was a horizontal concentration of beer suppliers in Wisconsin. Here, there is no horizontal merger—ABI is simply not acquiring Modelo's U.S. business and market share. ABI/Modelo Mot. Dismiss 6:3-8:20, June 3, 2013, ECF No. 41.

Plaintiffs' citation to *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), is equally inapposite. The extended quotation regarding potential competition law is not relevant here—Plaintiffs have not argued that the transaction impacts a potential competitor, they assert (incorrectly) that it is an acquisition of an actual competitor.

The citation to *American Tobacco v. United States*, 328 U.S. 781 (1946), stands for the proposition that in some industries national advertising can be a barrier to entry. Again, this misses the point—because ABI is not acquiring Modelo's U.S. business, there is no concentration to start with, so whether there may be barriers to entry is not relevant to resolving this point. The "Horizontal Merger Guidelines" is a resource developed by DOJ and the Federal Trade Commission as reference to "describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition." Dept. of Justice & Fed. Trade Comm., *Horizontal Merger Guidelines*, at pg.1 (Aug. 19, 2010) (hereinafter HMG). In 2010, the Horizontal Merger Guidelines were revised to state that any "[m]ergers involving an increase in the [Herfindahl–Hirschman Index ("HHI")] of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis." HMG § 5.3. Although Plaintiffs cite to the use of HHI as a measurement for market concentration (Pls.' Mot. TRO 4:24-5:2), they do not, and cannot, cite to any increase in market concentration post-transaction. Because this transaction does not increase market concentration at all and, in fact, decreases concentration, an HHI analysis would conclude that the transaction is presumptively free of adverse competitive effects.

As shown above there is no legal basis for Plaintiffs' Section 7 claims. The additional factual information that Plaintiffs seek to obtain through preliminary discovery would not remedy

those deficient claims. Therefore, that request for discovery should not be granted and cannot form the basis for granting Plaintiffs' motion for a TRO.

1. Constellation Has Ample Financing To Purchase Modelo's U.S. Business.

Constellation has ample financing to purchase, operate, and expand Modelo's U.S. business. Plaintiffs assert, without supporting factual detail, that Constellation cannot afford to buy the Piedras Negras brewery or Modelo's interest in Crown. (FAC ¶ 30.) But Mr. Hetterich makes clear that "Constellation has the financial wherewithal" not only to purchase these assets, but also to complete the expansion of the Piedras Negras brewery required in the consent order. (*See* Ex. 2, Hetterich Decl. ¶ 10.) "Any suggestion that Constellation cannot afford these transactions is unfounded and patently untrue." (*Id.* ¶ 13.)

"Constellation has secured financing to cover the entire $4.75 billion purchase price," and this additional debt "will not unduly burden Constellation's business." (*Id.*) Indeed, "Constellation typically maintains a debt level of approximately three to four times earnings, which is relatively conservative compared with other companies in the industry. As a result of these transactions, Constellation's debt-to-earnings ratio will rise to approximately five times earnings, which is still within the range of that carried by many significant peers in the beverage alcohol industry. In fact, Constellation anticipates, using conservative projections, reducing its debt load back down to [its] normal three to four times earnings level within approximately two years of closing because of the increased cash flow from the beer business as a result of this transaction." (*Id.*) As evidence that the market is comfortable with this arrangement, "[c]redit rating agencies have fully reviewed the transaction and have chosen not to downgrade or adjust Constellation's strong credit rating as a result of the increased debt leverage." (*Id.*)

2. Constellation Has Ample Expertise in the U.S. Beer and Beverage-Alcohol Industries.

Constellation possesses ample expertise in beverage-alcohol production, marketing, and distribution, including two decades of uninterrupted experience managing Modelo's U.S. beer business. Plaintiffs allege that Constellation is "not a beer brewer but one of the world's largest wine companies," implying that Constellation is a novice when it comes to beer. (FAC ¶ 30.) In

reality, it is Plaintiffs who are ill-informed: "Constellation has substantial experience in the beer industry such that the transition in ownership for Crown will be seamless and without difficulty." (Ex. 2, Hetterich Decl. ¶ 10.) As the DOJ recognizes, the consent order "will assure Constellation's future independence as a self-supplied brewer and seller in the United States beer market." (Ex. 3, CIS at 3). The sale of the Piedras Negras plant to Constellation and its expansion is crucial in this regard, and the consent order "prevents ABI or Modelo from interfering with Constellation's retention of those employees as part of the asset transfer. Together with the transition services, *this provides Constellation with the specific knowledge necessary to operate the Piedras Negras Brewery*." *Id.* at 14 (emphasis added). Moreover, Constellation has been a player in the U.S. beer industry since it purchased Barton Beers in 1993. (Ex. 2, Hetterich Decl. ¶ 12.) At the time, Barton was the sole importer of Modelo beer brands in the western United States. In 2007, Modelo unified its U.S. importer structure through Crown, a joint venture with Constellation to which Constellation contributed all of the Barton management and staff. (*Id.*) Thus "Constellation has the capability and know-how to manage the [Piedras Negras] brewery and compete vigorously in the U.S. beer business." (*Id.* ¶¶ 12, 14.) At other times in its history, Constellation has successfully owned and managed a regional brewery in the United States and has owned and managed the second largest cider producer in the United Kingdom. (*Id.* ¶ 17.)

Moreover, Plaintiffs grossly undervalue Constellation's expertise and accomplishments in the wine industry. Plaintiffs ignore the fact that there is significant overlap between the production of wine and beer because they require "[m]any of the same commodities . . . , including glass, labeling, cardboard, and yeast." (*Id.* ¶ 18.) In fact, making wine is more complex than brewing beer due to "the variability in grape production from season to season created by unexpected weather patterns, among other factors." (*Id.*) Plaintiffs' allegations also defy common sense because Constellation would not invest billions of dollars in a business it could not run capably. The company has been in the beverage-alcohol industry since 1945, and it was through prudent decision making that Constellation became "the world's largest premium wine producer." (*Id.* ¶¶ 11–12.)

3. Constellation Will Hold Total Operational Control and Ownership of Modelo's U.S. Beer Business.

The transactions will give Constellation full control of the Piedras Negras brewery and Crown, oblige Constellation to expand the brewery so as to become self-sufficient in meeting U.S. demand, and require ABI to provide transitional support in the interim on favorable terms. Plaintiffs predict that during this three-year interim period, Constellation will have to take orders from ABI because it will rely on ABI for part of Crown's supply of Modelo beers and for transitional assistance managing the brewery. (FAC ¶¶ 30, 108.) Plaintiffs' prediction lacks a logical basis. The transitional assistance ABI is *required* to provide—but that Constellation is not required to accept—on pricing terms that *cannot be changed* without Constellation's and DOJ's consent for the duration of the agreement, strengthens Constellation's competitive position and resolves any concerns about Constellation's independence or ability to immediately assume control of a major brewery. (*See* Ex. 2, Hetterich Decl. ¶¶ 19–20.)

Mr. Hetterich also firmly refutes Plaintiffs' related allegation that ABI will retain control by continuing to pay the salaries of brewery employees post-transaction (FAC ¶ 30): "All brewery personnel will be employed by and compensated by Constellation as of the date of the completion of the transaction. Neither ABI nor any other third party will contribute in any way to the compensation of those employees." (Ex. 2, Hetterich Decl. ¶ 16.) Furthermore, the brewery personnel will not change. Rather, "virtually all of those brewery employees, up to and including the brewery manager, will remain in their positions after the transaction has been completed." (*Id.* ¶ 15.)

4. Plaintiffs' Reliance on Allegations of Past Friction Between Constellation and Crown Is Misplaced.

The transfer of complete ownership of Modelo's U.S. beer business, including perpetual licenses and related rights, dramatically changes Constellation's incentives regarding Crown. Plaintiffs rely heavily on allegations of past friction between the companies—over Constellation's desire to maximize short-term profit and Crown's desire to build market share and brand equity over the long term (FAC ¶¶ 20–25)—to try to cast doubt on the likelihood of future aggressive

competition. However, complete ownership of Modelo's U.S. business aligns Constellation's interests with Crown's long-term focus on building market share and brand equity.

Thus, Crown's historically ambitious strategy, which Plaintiffs praise, in fact undercuts Plaintiffs' claims that Constellation will not compete aggressively after the transactions. On the contrary, Mr. Hetterich affirms that "Constellation has every intention to continue Crown's history of competing vigorously against all beer brands sold in the United States. Constellation affirms its dedicated commitment to actively increase Crown's market share, embodied in Crown's stated aspiration to achieve a twenty percent market share by revenue, much of which will come at the expense of ABI. Constellation's support of that vision includes its support for Crown's current and future plans to innovate and to introduce new brands to the market, even beyond the brands included in the Divestiture Assets." (Ex. 2, Hetterich Decl. ¶ 23.) Mr. Hetterich further observes that "[a]s the owner of both a brewery which will soon have an annual capacity of 20 million hectoliters and of the perpetual brand licenses in the United States of certain Modelo brands, Constellation's incentive is to utilize the brewing capacity of Piedras Negras as efficiently as possible and to drive sales to enhance the long-term health of the Crown brands and to build brand loyalty." (*Id.* ¶ 25.) Hence Constellation's "plans call for increasing significantly the support for Crown and staffing levels in that business." (*Id.* ¶ 26.)

5. The DOJ Approved the Revised Transactions Based on Constellation's Robust Competitive Presence.

The DOJ carefully investigated the ABI–Modelo transaction and—after taking the major step of challenging the original transaction in court—approved the revised transactions because they substantially enhance Constellation's competitive position. Constellation cooperated fully throughout the nearly yearlong investigation of both the original and revised transactions: "During that investigation, DOJ requested and obtained thousands of documents from Constellation and Crown. They interviewed numerous wholesalers and retail customers to understand the market and its competitive dynamics and conducted depositions of six Crown and Constellation executives. Constellation gave or participated in several presentations to DOJ staff and the front office and spent millions of dollars complying with DOJ's requests." (*Id.* ¶ 6.)

Moreover, "[a]fter the initial deal was challenged by DOJ and then restructured by ABI and Constellation to resolve its concerns, DOJ spent another two months specifically investigating Constellation's financial wherewithal, its competitive incentives, and its experience in the production, marketing, and sale of beer and related products. As a result of that investigation, DOJ agreed that Constellation could use the assets to step into the shoes of Modelo and vigorously compete, independent of ABI's influence." (*Id.* ¶ 19.)

The DOJ's approval is further and crucial proof that Constellation can address fully any competitive concerns, and, consequently, that Plaintiffs cannot make *any* showing, by substantial proof or otherwise, that they are likely to succeed on the merits. There is no dispute that the DOJ's investigation was thorough and its analysis extensive. (*See* Ex. 3, CIS at 4–9, 20–21, 25–26.) Plaintiffs have not alleged (and certainly cannot prove) otherwise.

II. THE BALANCE OF EQUITIES DOES NOT TIP, "SHARPLY" OR AT ALL, IN PLAINTIFFS' FAVOR.

The equities are informed, in part, by the status of the transactions and the steps Plaintiffs have taken to bring their claims. ABI's acquisition of Modelo, which has been publicly known for approximately a year, was completed today, June 4, and will be followed on Friday, June 7, by Constellation's acquisition of the Modelo U.S. business assets. (Ex. 2, Hetterich Decl. ¶ 8.) In fact, it has already been partially completed. Following the DOJ's agreeing to its consent order, ABI initially completed the first step, which moved it from a minority ownership position to one in which it had a majority of the equity and effective control of the company. (*Id.*) The publicly announced tender offer for the outstanding shares closed on May 31. (*Id.*) This morning, June 4, ABI acquired the tendered Modelo shares and owns almost all of Modelo's shares. (*Id.*)

Far from tipping "sharply"[2] in Plaintiffs' favor, the balance of equities favors Constellation, and Defendants generally, for many reasons. *First*, Plaintiffs' unreasonable delay in filing suit, and then seeking injunctive relief, undermines their claim for equitable relief. Plaintiffs waited three months after filing their Complaint and more than six weeks after the end

[2] *AT&T Mobility*, 2011 U.S. Dist. LEXIS 124084, at *10. While *Winter* does not require that Plaintiffs demonstrate the balance of equities tips "sharply" in their favor, 555 U.S. at 20, Plaintiffs then would have to make a stronger showing on the irreparability and public interest prongs, which they cannot.

of DOJ's investigation to seek a TRO for a transaction that closed today, June 4, 2013. They have withheld filing until now despite public information as to the status and timing of the transaction. Plaintiffs' self-serving delay in filing a motion for a TRO here, also designed to extract a quick settlement, is no less egregious than in *Taleff* and other post-merger cases. Plaintiffs do not, therefore, merit the equitable remedy of injunctive relief. *See Ctr. for Biological Diversity v. Cal. DOT*, No. C 12-02172 JSW, 2012 U.S. Dist. LEXIS 157190, at *22 (N.D. Cal. Nov. 1, 2012) (stating, en route to denying plaintiffs' motion for preliminary injunction, that "[t]he Court shall . . . consider the Moving Plaintiffs' alleged delay to evaluate whether the balance of the equities tip sharply in their favor"); *id.* at *37–38 (weighing "the fact that the Moving Plaintiffs did not file their motion until after Caltrans had awarded the contract for the Willits Bypass Project").

Second, in the revised transactions, Constellation has assumed substantial obligations that will become more difficult to meet, and incurred significant costs that will continue to accrue, with every day the transactions are postponed. Constellation has now committed, at this late date, significant resources to completing its transaction on June 7, as planned. If that closing date is delayed, Constellation must pay a non-recoverable fee of $1 million to the banks that have already provided the financing to support that closing. (Ex. 2, Hetterich Decl. ¶ 28.) Upon consummation, Constellation will have a legal obligation pursuant to the consent order to double the capacity of Modelo's Piedras Negras plant by the end of 2016. Constellation is committed to meeting the deadline, "but any extended delay in the closing hampers [the company's] ability to comply with that commitment." (Ex. 2, Hetterich Decl. ¶ 30.)

Constellation also has secured $4.75 billion in financing to purchase the Divestiture Assets, but it is expensive to maintain access to so much idle credit rather than deploying the capital for productive use. (*Id.* ¶ 28 ("Constellation must pay an average of $250,000 per day in financing charges for each day the deal is delayed. That figure increases in mid-June and at certain dates thereafter. Moreover, an unwarranted delay would threaten the favorable financing terms obtained by Constellation[:] . . . the best financing rates for a non-investment grade company since the economic crisis.").) Though Constellation can bear this cost, it is wasteful and

thus harmful to the company and its shareholders. *See British Printing & Commc'n Corp. PLC v. Harcourt Brace Jovanovich, Inc.*, 664 F. Supp. 1519, 1532 (S.D.N.Y. 1987) (refusing to grant injunction so that, in part, defendant would not "incur substantial interest charges without receiving the attendant benefits of recapitalization").

Moreover, "a significant delay could threaten the financing arrangement altogether." (*See* Ex. 2, Hetterich Decl. ¶ 28 ("If the deal is not completed by December 31, 2013, the financing arrangement lapses, and Constellation forfeits approximately $80 million in financing costs.")); *see also FTC v. Evans Prods. Co.*, 775 F.2d 1084 (9th Cir. 1985) (denying FTC's motion for a preliminary injunction because, in part, of the impairment of the transaction value due to defendant's financing); *Ginsberg v. InBev SA/NV*, No. 4:08-CV-01375, 2008 WL 4965859, at *5 (E.D. Mo. Nov. 18, 2008) (denying an injunction in part because a delay in closing could jeopardize the financing commitments made for the acquisition). Further, with each day the transaction is delayed, "Constellation loses, in addition to the financing costs, the profit it would have gained as beneficial owner of the Divestiture Assets. That loss totals approximately $2 million *per day*." (*Id.* ¶ 29) (emphasis in original); *see also Garabet v. Autonomous Techs., Corp.*, 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000) (finding the balance of hardship weighed in defendants' favor because of the $45 million already spent on integration and because without the acquisition the acquired firm would fail); *Sandoz, Inc. v. FDA*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) ("[E]ntry of [preliminary] injunction would deprive [defendants] of the exclusivity to which [they are] entitled and millions of dollars a day.") (denying motion for TRO).) In addition, a TRO also would cause significant intangible harm, creating "substantial uncertainty that would be disruptive to Constellation's business operations and to its employees and business partners, including beer distributors." (*Id.* ¶ 31); *see also Sandoz*, 439 F. Supp. 2d at 33 (refusing preliminary injunction because it could "harm intervenor-defendants by destroying goodwill and impairing their future access to major customers.").

Third, Constellation's shareholders have made significant investment decisions based on expectations that have developed since the transactions were announced. As Mr. Hetterich explains, "[i]nvestors and analysts are very bullish on this deal and its effect on [Constellation]."

(*Id.* ¶ 27.) The company's stock price jumped twenty-five percent on the first day of trading following public disclosure of the original transaction, and has since continued to increase from its pre-announcement level. (*Id.*) Every extra day that passes without consummating the transaction produces lost synergies and lost opportunities to start implementing Constellation's business plan, with concomitant opportunity cost. It is thus "important to Constellation that the deal be completed expeditiously to avoid diminishing value for . . . investors." (*Id.)*; *see also British Printing*, 664 F. Supp. at 1532 (balance of equities did not favor preliminary relief because "the expectations of the marketplace upon which investors have bought and sold [defendant's] stock would be defeated").). In sum, Plaintiffs' simply waive their hands to ignore the real and substantial harm that delays in closing the transactions would create. Plaintiffs assert that because the transaction has been "delayed" by twelve months with no harm, another few months will not create harm. Pls.' Mot. TRO 9:12-16. That is preposterous in light of the financing, operational, shareholder and other harms that would result from a delay in the transactions closing.

Fourth, it weighs against Plaintiffs in the balance of equities that they have not posted any bond (or indicated the bond they would post) and, being nine individuals, are likely unable to post an adequate or proper bond. *See* Fed. R. Civ. P. 65(c); 15 U.S.C. § 26 (2006) (finding the risk of harm weighed in defendants' favor because the plaintiffs "have neither posted, nor offered to post, any type of bond to support their claims"). Thus, Constellation will not be made whole for clear-cut and easily identifiable monetary damages from a TRO, let alone for the intangible harms it and its shareholders would suffer, in the event that a TRO is wrongfully entered against Constellation.

Finally, in addition to the tremendous hardship imposed on Constellation, equity must also consider that Constellation is the company that *the government has endorsed* as purchaser of the Modelo U.S. business. Each day the transaction is delayed pushes back Constellation's efforts to expand the Piedras Negras brewery and compete independently and vigorously against ABI others to the benefit of consumers. Plaintiffs have little to put on the scale. As discussed

more fully below, the alleged harms—higher prices, lower quality, and less selection—would be compensable with money damages under state law in California (and many other states).

III. PLAINTIFFS CANNOT CLEARLY SHOW BY SUBSTANTIAL PROOF THAT THEY WILL SUSTAIN IRREPARABLE HARM ABSENT A TRO.

At least three obstacles prevent Plaintiffs from establishing the irreparable-harm element necessary to obtain a TRO.

First, as ABI discusses at length in its papers, Plaintiffs' strategic dithering undercuts their ability to satisfy this prong of *Winter*. *See, e.g.*, *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("A long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Puruganan v. HSBC Bank USA, Nat'l Ass'n*, No. C 12-05168 SBA, 2012 U.S. Dist. LEXIS 162208, at *9–10 (N.D. Cal. Nov. 13, 2012) **(**"Plaintiffs' delay in seeking relief undermines their claim of irreparable harm. . . . While delay in seeking a TRO is not dispositive, it certainly militates against any claim of urgency . . . [and is] relevant in determining whether relief is truly necessary.") (citation and internal quotation marks omitted).

Second, Plaintiffs fail to plausibly explain, let alone clearly show by substantial proof, what harm Constellation has caused or will cause them if the transactions are consummated. Plaintiffs' purported harms consist of mere speculation about a phantom price-fixing agreement, lower product quality, and diminished selection. *See Tech. & Intellectual Prop. Strategies Grp. PC v. Fthenakis*, No. C 11-2373 MEJ, 2012 U.S. Dist. LEXIS 5193, at *15–16 (N.D. Cal. Jan. 17, 2012) ("Because Plaintiff's arguments are based on conjecture and speculation, irreparable harm has not been established. Based on this and Plaintiff's delay to seek a preliminary injunction, its motion is DENIED."). Indeed, as explained above, Plaintiffs have not adequately alleged the existence of a price-fixing agreement. Regardless, money damages would make Plaintiffs whole from the harm of paying supposedly higher prices. *See, e.g.*, *L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("It is well established . . . [that] monetary injury is not normally considered irreparable."); *Blind Doctor, Inc. v. Hunter Douglas, Inc.*, No. C-04-2678 MHP, 2004 U.S. Dist. LEXIS 18480, at *30-31 (N.D. Cal. Sept. 7, 2004) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and

energy necessarily expended . . . are not enough.") (quoting *Sampson v. Murray*, 415 U.S. 61 (1974)). Plaintiffs in fact cite to this proposition in the TRO quoting from the CIS, which notes that the federal antitrust laws provide remedies to "any person who has been injured as a result of conduct prohibited by the antitrust laws . . . to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees." (Pls.' Mot. TRO at 9-10)

Plaintiffs' unsupported allegations in their FAC of lower product quality and diminished selection run directly counter to the DOJ's analysis and Mr. Hetterich's Declaration, but these purported harms, too, can be recompensed with a monetary award under state law in California and many other states. Under the terms of the consent order, Constellation obtains rights to introduce additional Modelo brands into the United States that Modelo does not sell here currently, (Ex. 3, CIS at 11–12), ensuring that the transaction will enhance, not diminish, consumer choice. Constellation also will gain rights to Modelo's beer recipes, including the option (but not the obligation) to adopt any changes Modelo makes to those recipes. *Id.* at 12. These rights enable Constellation to maintain the high quality of Modelo beers and "adapt to changing market conditions in the United States to compete effectively in the future," while reducing "ABI's ability to interfere with those adaptations." *Id.* It is common knowledge that there is a wide variety of beers available in the marketplace should Plaintiffs seek to broaden their palates. Even if Plaintiffs had argued lower quality and less selection more convincingly, they effectively conceded that money would be an adequate remedy by alleging that beer is a "commodity" product. (FAC ¶ 83.).[3]

Finally, Plaintiffs have posted no bond and their ability to post an adequate bond is in serious doubt. The damages to Constellation explained above are, therefore, effectively irreparable: "Normally the mere payment of money is not considered irreparable, . . . but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (citations omitted). Constellation, on the other hand, is a multibillion-dollar

[3] Specifically, Plaintiffs allege that ABI and MillerCoors consider beer to be a commodity product. But Plaintiffs imply that they agree with this purported view, probably to avail themselves of the general inference that commodity products are more susceptible to antitrust violations.

company that could make Plaintiffs whole in the unlikely event that Plaintiffs could establish liability after a full and fair trial on the merits.

IV. PLAINTIFFS CANNOT SHOW BY SUBSTANTIAL PROOF THAT A TRO IS IN THE PUBLIC INTEREST.

Finally, Plaintiffs cannot make a clear showing by substantial proof that a TRO would be in the public interest because, in fact, a TRO runs counter to the public interest, as vindicated by the government in the pending litigation in the District of Columbia. The DOJ already has conducted a careful investigation and analysis of the transaction, and ensured that the revised transactions will make Constellation a vertically integrated, fully independent, and highly capable producer and seller (through Crown) of beer in the United States, free from any indirect ownership, influence, or control by ABI. As described above, the sale of the U.S. Modelo business to Constellation is procompetitive. It improves the current market structure by eliminating various entanglements between ABI and the U.S. Modelo business. Part of that improved market structure involves Constellation getting full control of Crown and the Piedras Negras brewery. Following closing, Constellation will expand the brewery so it will be able to produce all of Crown's beer needs. Constellation cannot undertake that procompetitive expansion if an injunction is in place. The public interest is not served by allowing the Plaintiffs to shake down these companies where their transaction already has been scrutinized in depth by the DOJ and where Plaintiffs cannot offer any plausible basis for delaying the benefits of this transaction for consumers. The DOJ has vindicated the public interest, whereas Plaintiffs and their counsel seek merely to vindicate their own.

CONCLUSION

For the reasons stated above, Plaintiffs have not satisfied their burden to establish all four *Winter* elements by a clear showing of substantial proof, as required to obtain a TRO. In fact, Plaintiffs have established none of the elements, and Constellation urges the Court to deny Plaintiffs' TRO motion and their premature request for discovery.

Dated: June 4, 2013

McDERMOTT WILL & EMERY LLP

By: /s/ Daniel E. Alberti
Daniel E. Alberti

Attorneys for Defendant
CONSTELLATION BRANDS, INC.

ECF CERTIFICATION

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this fourth day of June, 2013. As of this date, all counsel of record, except for Plaintiffs' counsel Kenneth Schwartz, have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system.

PROOF OF SERVICE

I, Cheryl A. Lovdahl, declare:

I am a citizen of the United States and employed in San Mateo County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 275 Middlefield Road, Suite 100, Menlo Park, California 94025. On, June 4, 2013, I served a copy of the within document(s):

1. **BRIEF OF CONSTELLATION BRANDS, INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER;**

2. **DECLARATION OF PAUL HETTERICH IN SUPPORT OF DEFENDANT CONSTELLATION BRANDS, INC.'S OPPOSITION TO PLAINTIFFS' MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER; AND**

3. **[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Menlo Park, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed FedEx envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by transmitting via electronic mail the document(s) listed above to the electronic mail addresses as set forth below on this date for 5:00 p.m.

Kenneth R. Schwartz, Esq.
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STEVEN EDSTROM AND BARRY GINSBURG, MARTIN GINSBURG, EDWARD LAWRENCE, SHARON MARTIN, MARK NAEGER, JOHN NYPL, DANIEL SAYLE, WILLIAM STAGE

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 4, 2013 at Menlo Park, California.

/s/ Cheryl Lovdahl
Cheryl Lovdahl